



**Item 1**  
**(August 26, 2008 meeting book)**

August 12, 2008

**DRAFT ADVISORY OPINION 08-XXX**

Whether members of the Tennessee Commission on Uniform Legislation are “officials in the legislative branch” as defined by Tenn. Code Ann. § 3-6-301(20), and if so whether persons communicating with such members for compensation for the purpose of influencing legislative action or administrative action are engaged in “lobbying” as defined in Tenn. Code Ann. § 3-6-301(15) and must therefore register as lobbyists as required by Tenn. Code Ann. § 3-6-302.

**INTRODUCTION**

The following Advisory Opinion has been requested by Mr. Mark E. Nebergall, President of the Software Finance and Tax Executives Council (“SoFTEC”).

**QUESTIONS**

Mr. Nebergall poses the following questions:

1. Are members of the Tennessee Commission on Uniform Legislation (“TCUL”) officials in the legislative branch (“Legislative Officials”) as defined by the Tennessee Ethics Reform Act (“Act”)?
2. If members of the TCUL are Legislative Officials as defined by the Act, must people who communicate with them for compensation register as lobbyists and comply with the Act’s lobbyist reporting requirements?

**ANSWERS**

1. Yes. Members of the TCUL are Legislative Officials as defined in Tenn. Code Ann. § 3-6-301(20).

2. If a person is paid to communicate with a member of the TCUL *for the purpose of influencing any legislative action or administrative action*,<sup>1</sup> and if the person’s actions go beyond the mere furnishing of information requested by an official or the giving of testimony at an official hearing, then that person is a lobbyist and must register as a lobbyist unless a specific exception applies.

**FACTS**

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<sup>1</sup> Tenn. Code Ann. § 3-6-101(15)(A)(emphasis added).

**Information Regarding SoFTEC**

SoFTEC provides “public policy advocacy on finance and tax issues,” to federal, state and international bodies regarding the “impact of their activities on software companies,” a “forum for the exchange of ideas between tax and financial executives at software companies worldwide,” and promotion of the “best interests of its members through the development and communication of industry positions.”<sup>2</sup>

A brief survey of news sources finds that SoFTEC was launched in 1999 as a trade association.<sup>3</sup> Part of SoFTEC’s purpose was to “lobby Congress and conduct public awareness campaigns regarding finance and tax policy issues affecting the software industry.”<sup>4</sup> SoFTEC is registered as the employer of a lobbyist on the federal level. It is not registered as an employer of a lobbyist (“Employer”) within Tennessee.<sup>5</sup>

Mr. Nebergall’s communication with TCUL members is presently limited to attending conferences of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and responding to requests by NCCUSL and TCUL members. He would like to expand his activities to include more traditional lobbying activities, such as taking TCUL members out to dinner in order to discuss potential legislation.<sup>6</sup> Mr. Nebergall’s question is whether engaging in the contemplated, future conduct would require him to register as a lobbyist.

**ANALYSIS**

**I. Members of the TCUL as Legislative Officials**

**A. Definition of Legislative Officials**

Tenn. Code Ann. § 3-6-301(20) defines “official in the legislative branch” as, in part, “any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action.”

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<sup>2</sup> <http://www.softwarefinance.org/> (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

<sup>3</sup> <http://www.softwarefinance.org/press/softec.htm> (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

<sup>4</sup> <http://partners.nytimes.com/library/tech/99/10/cyber/capital/26capital.html>. (last visited May 30, 2008); [http://news.cnet.com/Software-firms-assemble-for-political-pull/2100-1040\\_3-231811.html](http://news.cnet.com/Software-firms-assemble-for-political-pull/2100-1040_3-231811.html) (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

<sup>5</sup> SoFTEC’s United States Senate Lobbying Disclosure can be found at [http://www.senate.gov/pagelayout/legislative/b\\_three\\_sections\\_with\\_teasers/clientlist\\_page\\_S.htm](http://www.senate.gov/pagelayout/legislative/b_three_sections_with_teasers/clientlist_page_S.htm) (last visited May 30, 2008). Their United States House of Representatives Lobbying Disclosure can be found at <http://lobbyingdisclosure.house.gov/software.html?alpha=83> (last visited May 30, 2008).

<sup>6</sup> Mr. Nebergall discussed by telephone how his proposed action differs from his present action. He made clear his contemplated activities would be more like traditional lobbying activities.

Thus, the test for being a Legislative Official is threefold. First, the General Assembly must have established the commission of which the individual is a member. Second, the commission must be responsible to the General Assembly. Third, the commission must take legislative action.

**B. Meaning of “Legislative Action”**

Tenn. Code Ann. § 3-6-301(14) defines “legislative action” as “introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed in a legislative committee or in either house of the general assembly.”

**C. Duties of members of the TCUL**

The stated purpose of the TCUL is “the promotion of uniformity of legislation in the United States.” The TCUL consists of three (3) lawyers appointed by the Governor. <sup>7</sup>

The duties of a TCUL member are found in Tenn. Code Ann. §§ 4-9-102 and 4-9-103. They are:

1. To examine the subjects upon which uniformity of legislation is desirable, but which are outside the jurisdiction of Congress.
2. To confer about those matters with the Commissioners from other states and territories.
3. To consider and draft uniform laws to be submitted for approval and adoption by the states.
4. To advise and recommend such other or further course of action as shall accomplish the purposes of Chapter 9 of Title 4. <sup>8</sup>
5. To keep a record of its transactions, and at the session of each General Assembly, make a report of its doings and recommendations. <sup>9</sup>

Mr. Charles Trost, Chair of the TCUL, submitted an explanatory letter with attachments before the Commission’s June 24, 2008 meeting. He also appeared at the meeting and explained how the TCUL and NCCUSL operate. The Commission has considered Mr. Trost’s letter, e-mails, oral statements, and the TCUL report submitted after the meeting.

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<sup>7</sup>The Director of Legal Services or the Director’s designee is an associate member. Tenn. Code Ann. § 4-9-101.

<sup>8</sup> Tenn. Code Ann. § 4-9-102.

<sup>9</sup> Tenn. Code Ann. § 4-9-103.

TCUL members are also members of the NCCUSL and thus attend the annual NCCUSL conferences.<sup>10</sup> The members of the TCUL participate in a nationwide discussion of uniform laws through their membership in NCCUSL. Together with other members of the NCCUSL, they examine the subjects upon which uniformity of legislation is desirable, but which are outside the jurisdiction of Congress; they confer about those matters with the Commissioners from other jurisdictions, and they consider and draft uniform laws to be submitted for approval and adoption by the states. In addition, in each state they “seek introduction and enactment of Uniform Acts promulgated by the [NCCUSL] that are appropriate for their State.”<sup>11</sup>

A short review of the NCCUSL’s website finds that the duties of a State Commissioner on Uniform legislation include “work[ing] toward enactment of Conference acts in their home jurisdictions”<sup>12</sup> and “advocate[ing] the adoption of uniform and model acts in their home jurisdictions.”<sup>13</sup> The website page describing the work state Commissioners on Uniform Legislation are expected to perform states: “[w]hen drafting is completed on an act, a commissioner’s work has only begun. They advocate the adoption of uniform and model acts in their home jurisdictions. Normal resistance to anything ‘new’ makes this the hardest part of a commissioner’s job. But the result can be workable modern state law that helps keep the federal system alive.”<sup>14</sup>

#### **D. The TCUL’s Legislative Action**

Many of a TCUL member's activities would not constitute “legislative action;” many would. Many activities fall somewhere in the middle. For example, it is difficult to determine whether making a report to the general assembly, as required by the statute, should be viewed as taking “nonministerial official action or nonaction” on that report. On the other hand, the duties of members to “work toward enactment of Conference acts in their home jurisdictions”<sup>15</sup> and “advocate the adoption of uniform and model acts in their home jurisdictions”<sup>16</sup> would constitute “legislative action.” It matters not whether the preliminary discussion and drafting is conducted out of state.

Under Tenn. Code Ann. §§ 4-9-102(4) and 4-9-103, quoted above, the TCUL is also to advise and make recommendations to the Tennessee General Assembly. Those functions must be examined to determine whether they constitute “legislative action.” “Advise” may mean to

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<sup>10</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

<sup>11</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18> (last viewed July 8, 2008)(quotation taken from Article 6, § 6.1 of the NCCUSL’s bylaws).

<sup>12</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

<sup>13</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

<sup>14</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

<sup>15</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

<sup>16</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

advocate, to propose, or simply to provide information or notice as in “advise them of their rights.”<sup>17</sup> The presence of the word “advise” does not per se render members of the TCUL Legislative Officials. Thus, to the extent that the meaning of “advise” is ambiguous, we consider the meaning of “recommend” in conjunction. “Recommend” means “to present as worthy of acceptance or trial” as in “*recommended* the medicine” or “endorse as fit, worthy, or competent” as in “*recommends* her for the position.”<sup>18</sup>

The Commission concludes that giving general advice to the general assembly may or may not be “legislative action”<sup>19</sup> as contemplated by the Act. However, the Commission concludes that “recommend[ing] such other or further course of action as shall accomplish the purposes of this chapter”<sup>20</sup> does rise to the level of “legislative action.” This is especially true as all TCUL members are also NCCUSL members, and are thus expected to “work toward enactment of Conference acts in their home jurisdictions.”<sup>21</sup>

Since the TCUL was created by the General Assembly, is responsible to the General Assembly and takes legislative action, the members of the TCUL are Legislative Officials. A Legislative Official is not required to spend all of his or her time engaged in legislative action. That a Legislative Official takes legislative action when such action is appropriate is sufficient.

## **II. Communications with Members of the TCUL as Lobbying**

### **A. General Definition of Lobbying**

As stated in Mr. Nebergall’s request, the individuals who would be communicating with the TCUL members would be compensated for their communication. A person who lobbies for compensation is a “lobbyist.”<sup>22</sup>

The issue is whether SoFTEC's communications with TCUL members by SoFTEC members would be lobbying. In the context of this Advisory Opinion, Tenn. Code Ann. § 3-6-101(15)(A) defines “lobby” as “to communicate, directly or indirectly, with any official in the legislative branch . . . for the purpose of influencing any legislative action . . . .”

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<sup>17</sup> <http://www.merriam-webster.com/dictionary/advise> (last visited July 9, 2008).

<sup>18</sup> <http://www.merriam-webster.com/dictionary/> (last visited July 9, 2008).

<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

<sup>19</sup> Tenn. Code Ann. § 3-6-301(14).

<sup>20</sup> Tenn. Code Ann. § 4-9-102.

<sup>21</sup> <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

<sup>22</sup> Tenn. Code Ann. § 3-6-301(15) and (17).

The definition of “lobby” has several exceptions, Tenn. Code Ann. § 3-6-101(15)(B) through (F). It does not appear that the proposed contact between a representative of SoFTEC and a TCUL member would fall within any of the exceptions to that definition.

**B. Influencing Legislative Action**

In order for a communication by a representative of SoFTEC to a member of the TCUL to constitute lobbying, the representative of SoFTEC would have to be communicating “for the purpose of influencing any legislative action or administrative action.”<sup>23</sup>

“Influencing legislative action” is defined in Tenn. Code Ann. § 3-6-101(13) as:

. . . promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies, or analyses requested by an official of the legislative or executive branch to that official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.

The NCCUSL extends a broad invitation to entities such as SoFTEC to submit information and make recommendations to the NCCUSL during its process of drafting proposed uniform laws and related documents. Mr. Nebergall’s activities up to this point appear to be limited to responding to such invitations. If Mr. Nebergall or another representative responded to a Commissioner’s request for information, statistics, studies or analyses, or gave testimony at a legislative hearing, the representative of SoFTEC would not be influencing legislative action. Therefore, the representative of SoFTEC would not be engaged in lobbying under Tenn. Code Ann. § 3-6-301(15)(A) and would not have to register as a lobbyist under Tenn. Code Ann. § 3-6-302.

As noted above, Mr. Nebergall’s present communication with TCUL members is not representative of the contact in which he would like to engage in the future. His proposed contact would include advocating in manners more traditionally associated with lobbying, such as taking at TCUL member out to dinner in order to discuss potential legislation. Mr. Nebergall’s contemplated future activity goes beyond the exclusion and must be analyzed separately to determine whether it would constitute lobbying.<sup>24</sup>

The Commission recognizes that TCUL only advises and recommends the General Assembly to adopt laws which have been developed and thoroughly discussed by the NCCUSL. This limitation of TCUL activities has no bearing on whether Mr. Nebergall’s contemplated activities would constitute lobbying. The Act does not require a lobbyist’s communication to

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<sup>23</sup> Tenn. Code Ann. § 3-6-101(15)(A).

<sup>24</sup> Tenn. Code Ann. § 3-6-101(15)(A).

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actually influence legislative action. Instead, the lobbyist's communication must only be "for the purpose of influencing any legislative action."<sup>25</sup>

The Commission also notes that according to the Chairman of the TCUL, if Mr. Nebergall were to attempt to persuade a TCUL member to advocate a SoFTEC position with regard to the adoption or amendment of a uniform state law, the TCUL member would decline to do so.<sup>26</sup> This fact has no bearing on whether Mr. Nebergall would be communicating with the TCUL "for the purpose of influencing any legislative action or administrative action."<sup>27</sup> If a communication occurs during the drafting of legislation, in anticipation of the TCUL member's recommending the legislation to the General Assembly, the communication could very well be communication for the purpose of influencing legislative action.

Just as one does not have to be an effective governor in order to govern, one does not have to be an effective lobbyist in order to lobby. In fact, the Act prohibits "fee[s], compensation or bonus[es] for lobbying wherein the amount of the fee, compensation or bonus is contingent upon achievement of an outcome deemed to be successful for the employer."<sup>28</sup> So, while it may be a worthless, futile endeavor for a SoFTEC representative to lobby a TCUL member, if the SoFTEC representative does choose to lobby the TCUL member for the purpose of influencing legislative or administrative action within the State of Tennessee, the SoFTEC representative would be required to register as a lobbyist<sup>29</sup> and make the required disclosures.<sup>30</sup>

Donald J. Hall, Chair  
R. Larry Brown  
Linda Whitlow Knight, Esq.  
Thomas J. Garland  
Dianne Ferrell Neal  
Benjamin S. Purser, Jr.,  
Commissioners

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<sup>25</sup> Tenn. Code Ann. § 3-6-101(15)(A).

<sup>26</sup> Mr. Charlie Trost, Chairman of the TCUL, stated to Commissioners that if a SoFTEC representative were to attempt to persuade a TCUL member to advocate a SoFTEC position with regard to the adoption or amendment of a uniform state law, the TCUL member would decline to do so. Under the Act, it is not the TCUL member's response that is at issue. Instead, it is the purpose of SoFTEC's communication.

<sup>27</sup> Tenn. Code Ann. § 3-6-101(15)(A).

<sup>28</sup> Tenn. Code Ann. § 3-6-304(k).

<sup>29</sup> Tenn. Code Ann. § 3-6-302.

<sup>30</sup> Tenn. Code Ann. § 3-6-303.